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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060308
Party	Defendant Corcamore, LLC
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Submission	Motion to Strike
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Date	08/14/2015
Attachments	Sprout_Corc_Mo_Germaness_08_14_2015.pdf(71170 bytes) 08132015094939-0001.pdf(1157528 bytes) ND_Il_CivilityStds.pdf(38602 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SFM, LLC,	}	
Petitioner,	}	Cancellation No: 92 060308
v.	}	
	}	
Corcamore, LLC	}	Registration No. 3708453
	}	
Respondent-Registrant.	}	

MOTION OF RESPONDENT-REGISTRANT
TO ENFORCE RULE 2.127(d) ORDER.

Respondent Corcamore LLC moves to strike those parts of the petitioner's opposition filed 3 August 2015, which are "note germane to the motion[s]" before the Board, pursuant Trademark Rule 2.127(d). The portions that deserve to be stricken are highlighted on the exhibit to this motion.

Respondent-Registrant filed a germane motion that challenged the baselessness of an allegation essential to standing, whether petitioner has any "reasonable basis in fact" to have pleaded there are vending machines `owned or operated' by Respondent-Registrant.[1] For the petitioner's theory: that its brick & mortar grocery store beneath *Sprout's Farmers Market* signage, might be confused with a vending machine (*albeit nonexistent*) branded Sprout allegedly owned or operated by Respondent-Registrant - then the germane question asks about any "reasonable basis in fact" for petitioner to plausibly plead that such machines exist. If not (*and such machines do not exist*), then the petitioner SFM, LLC lacks the "commercial interest" that is fundamental to standing.[2] On that basis, Respondent-Registrant's motion was germane.

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[1] For standing, the petitioner must plead and prove "something more …than a subjective belief" and the belief it pleads "must have a `reasonable basis in fact.'" *Ritchie v. Simpson*, 50 U.S.P.Q.2d 1023, 1027 (Fed. Cir. 1999)(*cit. om.*).

[2] *Cunningham v. Laser Golf Corp*., 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000).

What is ***not*** germane, or relevant, or appropriate is much of petitioner SFM's opposition brief filed 3 August. The opposition by petitioner goes way away from germane - griping and kvetching about settlement, and indicating how SFM hopes to settle for nothing more than the cost of its lawyers. Those parts of the petitioner's opposition, dealing with private settlement negotiations, are irrelevant and not germane to standing, or to the motion, or to whether an allegation essential to SFM's standing has any basis in fact.

For that reason, the excerpts indicated in the attached exhibit should be stricken pursuant to Trademark Rule 2.127(d) and to the final paragraph of the suspension Order here.

Additionally, the lawyer signing petitioner SFM's opposition is subject to the "civility" standards of the U.S. District Court for the Northern District of Illinois, which instruct about the inappropriateness of unilaterally disclosing compromise proposals made in private negotiations. In pertinent part, these standards of the federal court require "good faith" by counsel in regard to "agreements implied by the circumstances" such as the confidentiality of settlement talks, for example these two standards:

> Lawyers' Duties to Other Counsel
>
> 6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.
>
> 30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

Those standards, and the poor choice by counsel to file in the public record, here, correspondence between counsel that communicated in confidence a proposal for settlement of this matter, should provide an additional reason to strike the non-germane parts from the record.

Attached hereto are two exhibits. Exhibit A indicates the portions of the brief that are not germane and should be stricken, and the request extends to the exhibit referred to in the non-germane portions. Exhibit B hereto are the civility standards referred to above.

Based on the foregoing, it is requested that the motion be granted, that the suspension order disallowing non-germane filings be enforced, and the indicated portions of the brief of petitioner SFM be stricken from the record.

DATE: 14 AUG 2015

/Charles L. Thomason
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CERTIFICATE OF SERVICE

I certify that on August 14, 2015 that the foregoing motion was electronically filed, and a complete copy was deposited with the U.S. Mail, addressed to petitioner's counsel of record at:

Nicole M. Murray, Esq.
Quarles & Brady
300 N. LaSalle St., Suite 4000
Chicago, IL 60654

BY: /Charles L. Thomason

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 3,708,053; Mark: SPROUT;
Date of Registration: November 10, 2009

SFM, LLC

Petitioner,

v. Cancellation No: 92060308

CORCAMORE, LLC.

Respondent.

SFM'S RESPONSE TO CORCAMORE'S RULE 11 MOTION

INTRODUCTION

Corcamore has resorted to a strategy of procedural gamesmanship that is wasting both SFM's and the Board's resources. And its Rule 11 motion violates Rule 11 itself. SFM's filings and pleadings in this matter are in compliance with the Board's procedure and the Federal Rules. Corcamore's request for sanctions should be denied for three reasons: 1) Corcamore failed to observe the appropriate procedures of Fed. R. Civ. P. 11(c) prior to filing its motion; 2) SFM has met the requirements of Fed. R. Civ. P. 8 and 11 in each its filings in this proceeding; and 3) Corcamore's motion is premature and frivolous. After the Board rejected Corcamore's first attempt to dismiss this cancellation, counsel for Corcamore threatened SFM with a "procedural Rubicon" if SFM would not agree to settle this matter, and promised "further procedural maneuvers, even before [SFM] undertakes discovery efforts to reach the substance, *vel non*, of

its assertions." This Rule 11 motion is just the latest example of opposing counsel's attempt to use procedural gamesmanship to make good on his threat.

ARGUMENT

I. Corcamore's Rule 11 motion should be denied because it did not follow the appropriate procedure under Fed. R. Civ. P. 11.

Corcamore did not follow the safe harbor requirement under Rule 11. SFM only learned that Corcamore had filed its motion for sanctions during a routine check of the case docket for this proceeding. While Corcamore had threatened to make such a motion via email, SFM did not receive a copy of the motion prior to its filing, only a conclusory assertion in an e-mail that one of its allegations was in violation of Rule 11. *See* E-mail chain between Mr. Thomason and Mr. Stahl/Ms. Murray, at pages 5-6, attached as **Exhibit A**. It was therefore immediately clear that Corcamore did not comply with Rule 11's requirement that the brief be served on SFM prior to filing. Counsel for SFM promptly contacted Corcamore's counsel to inform him of his mistake. Instead of withdrawing his motion, Corcamore's counsel filed an additional paper asking the Board's assistance with complying with Rule 11 by deferring consideration of the motion for 21 days. Notably, Corcamore's counsel cited no precedent that his proposed deferment was procedurally proper.

Fed. R. Civ. P. 11(c) "provides specific instructions in how to initiate a motion under this rule, and requires service of a proposed motion upon the party against whom the misconduct is alleged 21 days before the motion is filed." *See Baron Philippe de Rothschild S.A. v. Styl-rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1848 n. 2 (T.T.A.B. 2000). Specifically, the rule requires:

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but

Another case relied on by Corcamore, *Phonometrics, Inc. v. Economy Inns of America*, is also inapposite. 349 F.3d 1356, 68 U.S.P.Q.2d 1906 (Fed. Cir. 2003). In *Phonometrics*, another patent infringement case, the sanctioned party continued making arguments that had been adjudged improper in a parallel proceeding. *Id.* at 1360-61. Here, the Board has not adjudged SFM's pleadings to be improper.

In a third case relied on by Corcamore, *The Clorox Co. v. Chemical Bank*, no party was even sanctioned, but the Board cautioned the party against making "blatantly false" claims. 40 U.S.P.Q.2d 1098, n. 9 (T.T.A.B. 1996). Here, SFM's conduct is entirely proper. It has proffered good faith allegations based on Corcamore's trademark registration and publicly available website. It is only Corcamore's dilatory tactics which has prevented SFM from commencing discovery and proceeding with the cancellation.

Corcamore's reliance on *Carrini, Inc. v. Carla Carini S.R.L.* is interesting. 57 U.S.P.Q.2d 1067 (T.T.A.B. 2000). In *Carrini*, the Board mentioned that it may "impose sanctions for, among other things, filings that presented to the Board for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* at 1071; *citing* Fed. R. Civ. P. 11. In that case, due to the parties' overly voluminous briefing, the Board warned the parties against filing papers "for any improper purpose in violation of Fed. R. Civ. P. 11." *Id.* at 1072. To prevent this harassment-by-briefing, the Board ordered that the offending party only be allowed to file a paper in the proceeding after getting consent from the Board. *Id.* This behavior is more akin to Corcamore's conduct than SFM's.

Indeed, Corcamore's continued, sustained, and frivolous motion practice in this proceeding and its sister proceeding (No. 92061193) has vexatiously and unreasonably delayed the proceedings, and wasted the Board's and SFM's valuable resources. Indeed, Corcamore

wishes nothing more than to unduly increase SFM's costs in its protection and enforcement of its duly granted trademark rights. This is evidenced by counsel for Corcamore's communication to SFM, which SFM received shortly after the Board denied Corcamore's first attempt to dismiss this proceeding. It reads:

> The recent ruling on the motion to dismiss, etc., is one step further toward a procedural Rubicon for your grocery client's TTAB petition, which will lead to further procedural maneuvers, even before your client undertakes the discovery efforts required to reach the substance, *vel non*, of its assertions. The procedural circumstances will expand over to your filing of a 2nd petition.
>
> Please communicate to your client that they *(sic)* an agreed form of order resolving the case can be negotiated with the key term being payment to my client of $10,000. That option extends until the due date of the Answer in the 2nd petition.

See **Exhibit H**, Letter from Mr. Thomason to Ms. Murray/Mr. Stahl dated May 5, 2015. Corcamore has followed through on its promise of a "procedural Rubicon," filing numerous meritless motions in both this and its sister proceeding (No. 92061193).

This Rule 11 motion is another such example. In its motion, Corcamore asserts that certain of SFM's allegations "lack evidentiary support." Dkt. 20 at 2. However, Corcamore's counsel has led the Board and SFM across "a procedural Rubicon," and as a direct result, the proceeding has yet to go beyond the pleading stage. In fact, Corcamore's counsel's letter to SFM indicated that he intended to delay SFM's ability to take discovery for as long as possible. *See* **Exhibit H**. Now, and as noted above, Corcamore complains that SFM's statements lack evidentiary support. Corcamore cannot have it both ways. If it wants SFM to provide additional "evidentiary support" supporting its good faith allegations, it must cease its dilatory conduct and allow discovery to commence. Once discovery is underway, Corcamore will be entitled to seek factual basis for SFM's assertions in its discovery requests.

STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT

LAWYERS' DUTIES TO OTHER COUNSEL

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.

6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

24. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an expense or undue burden or expense on a party.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.